NO. _____
(Court of Appeals No. 27504-3-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFERY W. NICCUM, a married man,

Respondent,

vs.

RYAN L. ENQUIST, individually and the marital community composed of he and his wife, if any,

Petitioner.

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable Robert Austin, Judge

PETITION FOR REVIEW

Address:
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

REED McCLURE
By Marilee C. Erickson
Michael N. Budelsky
Attorneys for Petitioner

37 S. Wenatchee Ave., Suite F
Wenatchee, WA 98807
(509) 662-6131

CARLSON, MCMAHON & SEALBY, PLLC
By David L. Force
Attorneys for Petitioner

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I. IDENTITY OF PETITIONER

Petitioner is Ryan L. Enquist, defendant below and appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the published decision by Division III of the Court of Appeals, issued on September 1, 2009, and the order denying reconsideration issued on November 5, 2009. Copies of the decision and order are attached hereto as Appendix A and Appendix B respectively.

III. THE ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where Division III's decision conflicts with Division I's decision in *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), because Division III failed to compare comparables when it concluded Mr. Enquist did not improve his position on the trial de novo?

2. Should this Court accept review where an issue of substantial public importance is raised because Division III's decision undermines the purposes of the mandatory arbitration system and creates confusion by permitting a party's offer of compromise to alter the nature of the arbitration award?

IV. STATEMENT OF THE CASE

Plaintiff Jeffery Niccum ("plaintiff") and defendant Ryan Enquist ("Mr. Enquist") were involved in an automobile accident on July 4, 2004. (CP 2) In 2007, plaintiff sued Mr. Enquist to recover for his injuries. (CP 1-2)

The matter was transferred to mandatory arbitration. (CP 9) In February 2008, the arbitrator issued an award for plaintiff in the amount $24,496.00 for medical bills, wage loss, and pain and suffering. (CP 9) Mr. Enquist timely filed a request for trial de novo. (CP 23)

On March 20, 2008, plaintiff presented Mr. Enquist with the first offer of compromise in the amount of $22,000.00. (CP 11) On July 8, 2008, plaintiff presented Mr. Enquist with a second offer of compromise in the amount of $17,350.00. (CP 12) The second offer stated:

> COMES NOW Plaintiff, by and through his attorney, JERRY T. DYRESON, and pursuant to RCW 7.06.050 does hereby offer to compromise his claim in the amount of $17,350.00. Such compromise is intended to replace the arbitrator's award of $24,496.00 and replace the previous offer of compromise, with an award of $17,350.00 including costs and statutory attorney fees.

(CP 12) Mr. Enquist did not accept either offer.

The case proceeded to a jury trial. On August 14, 2008, the jury returned a $16,650.00 verdict in favor of plaintiff. (CP 6) The jury verdict stated:

We, the jury, find for the Plaintiff in the following sums:

(1) for past medical expenses $6,650.00

(2) for past lost wages $ ~~0~~

(3) for past noneconomic damages $10,000

(CP 6)

After the trial, plaintiff moved for MAR 7.3 fees and costs arguing that Mr. Enquist had not improved his position on the trial de novo. (CP 23-36, 37-38) Plaintiff sought $15,640.00 in attorney fees, $1,016.28 in costs, and $1,461.00 in expert expenses under MAR 7.3. *Id.*

Plaintiff argued that his costs of $1,016.28 incurred in trying the cases should be subtracted from the $17,350.00 offer of compromise. (CP 20, 24) Plaintiff argued that when his trial costs were subtracted from his compromise offer—$17,350 - $1,016.28 = $16,333.72—the result was less that the $16,650.00 jury award. Thus, plaintiff contended Mr. Enquist had not improved his position on the trial de novo. (CP 20)

Mr. Enquist asserted that he had improved his position on the trial de novo. (14-18) The jury's verdict of $16,650 was less than the $17,350 second compromise offer. The jury verdict was most certainly an improvement from the initial compromise offer of $22,000 and the arbitration award of $26,496. (CP 14-15; RP 4-6)

Mr. Enquist also asserted plaintiff lacked a legal basis to add statutory costs and fees to his second compromise offer when the arbitrator's award did not include a cost award. (CP 17; RP 5:8-15) Mr. Enquist maintained that he had improved his position at the trial de novo and plaintiff was not entitled to a MAR 7.3 award. (CP 17)

The trial court accepted plaintiff's argument and granted his motion. (RP 8-9) The court entered a judgment awarding plaintiff $15,640.00 in "reasonable attorney fees after date of arbitration," statutory costs and attorney's fees of $1,016.28,[1] and $1,461.00 in "expert witness fees." (CP 39-41)

Mr. Enquist appealed. (CP 42-47) Division III of the Court of Appeals issued a published decision upholding the trial court's rulings. *Niccum v. Enquist*, ___ Wn. App. ___, 215 P.3d 987 (2009), and denied Mr. Enquist's motion for reconsideration.[2]

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[1] At page three of the slip opinion (215 P.3d, ¶ 7), the costs are first stated as $1,016.28 and in the next paragraph stated as $1,061.28. (App. A) Footnote 3 of the opinion states that there was a mathematical error in the record. The clerk's papers consistently list the costs as $1,016.28. (CP 20, 24, 39, 45) The two different numbers on page three of Division III's slip opinion appear to be a transposing of the third and fourth digits in the amount of costs.

[2] In its original opinion, the Court of Appeals reversed the trial court's granting of expert expenses. However, it granted plaintiff's motion for reconsideration and reinstated the award of expert expenses. (App. B) Mr. Enquist does not seek review of the expert expense issue.

V. ARGUMENT

This Court will grant review when a Court of Appeals decision "is in conflict with another decision of the Court of Appeals." RAP 13.4(b)(2). This Court will also grant review if "the petition involves an issue of substantial public interest." RAP 13.4(b)(4). Division III's decision fits both grounds for review.

A. DIVISION III'S DECISION CONFLICTS WITH DIVISION I'S *TRAN V. YU* DECISION.

In *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), Division I followed the established rule that a court compares comparables when applying MAR 7.3. While Division III states it has followed *Tran v. Yu* (slip op. at 7, 215 P.3d at ¶ 17), Division III's decision actually conflicts with *Tran v. Yu.*

A party who requests trial de novo must only pay the opponent's fees and costs if the requesting party fails to improve his position at the trial de novo. MAR 7.3; RCW 7.06.060(1). Mr. Enquist improved his position at the trial de novo because the jury's award was less than the arbitration award and less than both of plaintiff's offers of compromise. The arbitration award was $24,496. (CP 9) Plaintiff's two offers of compromise were $22,000 and $17,350. (CP 11-12) The jury awarded damages of $16,650. (CP 6) Rather than apply the comparable amounts of $17,350 and $16,650, Division III endorsed a manipulation of the

compromise offer. Division III segregated the unsegregated compromise offer.

Because an arbitrator and a jury may award different types of damages, Washington courts endeavor to "compare comparables" in determining whether a party has improved his position on the trial de novo. *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003); *see also Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 717, 815 P.2d 293 (1991), *rev. denied*, 118 Wn.2d 1013 (1992). This Court has noted that it "generally agree[s] . . . that only comparables are to be compared." *Haley v. Highland*, 142 Wn.2d 135, 154, 12 P.3d 119 (2000).

In *Tran*, defendant requested a trial de novo after plaintiff was awarded $14,675.00 at arbitration. At trial, the jury awarded plaintiff only $13,375.00. After trial, plaintiff was awarded $3,205.00 under CR 37(c) and $955.80 in statutory costs. *Id.* at 610. When the CR 37(c) award and statutory costs were added to the jury's verdict, the judgment totalled $17,535.80. Plaintiff argued she was entitled to MAR 7.3 fees and costs because the total judgment exceeded the arbitration award. *Id.*

Defendant asserted that MAR 7.3 did not apply because she had improved her position at the trial de novo. She maintained that only the jury award could be compared to the arbitration award. The CR 37 award and statutory cost should not be included because there was no cost award

as part of the arbitration award. The trial court agreed with defendant and denied plaintiff's request for MAR 7.3 fees. Division I affirmed. *Id.* at 611, 616-17. The *Tran* court noted that plaintiff's proposal to include the costs and sanctions was inconsistent with the purpose of MAR 7.3. *Id.* at 612. The court determined that it was more appropriate to "compare comparables." *Id.*

In *Tran,* comparing comparables meant comparing the damages awarded by the arbitrator--$14,675.00--with the damages awarded by the jury at the trial de novo--$13,375.00. *Id.* The arbitration award did not include any award of costs. Using this simple comparison, it was obvious that defendant had improved his position and therefore, plaintiff was not entitled to an award of fees and costs under MAR 7.3.

Similarly here, a simple comparison of comparables shows that Mr. Enquist improved his position at the trial de novo. At plaintiff's urging, the trial court here did precisely what the *Tran* court rejected, namely manipulating statutory costs – which were not awarded by the arbitrator – in an attempt to reduce the offer of compromise to an amount below the jury's verdict. The fact that this case involves a compromise offer instead of an arbitration award does not justify a departure from the *Tran* decision.

When a party serves an offer of compromise, the compromise offer becomes the amount used to determine whether a party has improved his position on the trial de novo. RCW 7.06.050(1)(a) and (b). The statute provides as follows:

> (b) **In any case in which an offer of compromise is not accepted** by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, **the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.**

(Emphasis added.)

The arbitrator's award of $24,496.00 included amounts for medical bills, wage loss, and pain and suffering. (CP 9) It did not include any costs. It cannot be replaced, for purposes of MAR 7.3, with part of the amount of an offer of settlement, particularly when the alleged costs and attorney fees are not quantified. Plaintiff cannot unilaterally change the character of the arbitrator's award from one for only compensatory damages to one for compensatory damages plus an unspecified amount of costs. As the *Tran* Court discussed, only "comparables" should be compared in the MAR system. 118 Wn. App. at 612. Division III and the trial court failed to compare comparables. The decision conflicts with *Tran v. Yu.* This Court should accept review.

B. DIVISION III'S DECISION RAISES ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE ABOUT THE MANDATORY ARBITRATION SYSTEM.

1. The Decision Hampers Rather Than Promotes the Purposes Behind Mandatory Arbitration.

Washington's Legislature adopted mandatory arbitration to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). The provision allowing a party to recover costs when the appealing party fails to improve its position at the trial de novo was intended to discourage meritless appeals of the arbitrator's award. *Christie-Lambert Van & Storage Co., Inc. v. McLeod*, 39 Wn. App. 298, 302-03, 693 P.2d 161 (1984).

Justice Talmadge explained the purpose behind MAR 7.3 as follows:

> [The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland, 142 Wn.2d 135, 159 (2000), concurring opinion. Division III's decision adopts an approach to compromise offers which allows manipulation and creates confusion.

Allowing a retroactive application of costs in a MAR 7.3 analysis undermines the requesting party's ability to assess whether to accept a compromise offer. The requesting party will not know the amount to assess to determine whether the trial de novo has merit. Such uncertainty

thwarts the statute's purpose of discouraging meritless appeals and permits manipulation by the party making the compromise offer.

Even more uncertainty is created by Division III's conclusion that the compromise offer was a segregated amount. Slip op. at 6, 215 P.3d at ¶ 15. There was no segregated amount in either the arbitrator's award of $24,496.00 or the compromise offer of $17,350.00. The arbitrator's award was a single amount – the compensatory award without any award for costs. Similarly, the offer of compromise was for one, undivided amount.

Under a different set of facts, Division III's decision would be correct. For example, if the arbitrator had awarded $24,496.00 plus costs of $1,000, then a compromise offer of $17,350.00 including costs (i.e. $1,000.00) would mean that the party receiving the compromise offer would know that if the jury awarded $16,350.00 or more, the party would not have improved his position at the trial de novo. This sample scenario is not what happened here.

Plaintiff never offered a segregated amount. The lack of "segregation" is precisely the problem with his position. The amount was not segregated until after the trial when the court determined costs. The amount was then retroactively applied to the lump sum of the offer (made two months before) to change the number that both parties believed was the amount to beat at trial.

Division III erroneously states that "Mr. Enquist would have owed less to Mr. Niccum had accepted the offer of compromise." Slip op. at 7, 215 P.3d at ¶ 18. The statement ignores the nature of a compromise offer. Although an offer of compromise serves the purpose of establishing a new threshold for determining whether the requesting party improves his position at trial, the compromise offer remains at its essence, a settlement offer. If the defendant accepts the offer, he pays the agreed amount to plaintiff. After payment of the settlement amount, plaintiff has no recourse to seek costs. Only a "prevailing party" is entitled to an award of costs. RCW 4.84.010. Where an offer of compromise is offered and accepted, both parties agree to compromise for a settlement and neither is entitled to statutory costs. Further, no judgment is entered after a settlement agreement is reached. RCW 4.84.010 is clear that certain costs "shall be allowed to the prevailing party upon the judgment." (Emphasis added.)

In light of these basic tenets of case settlement, plaintiff's addition of language indicating that the offer was inclusive of costs and statutory attorney fees is entirely irrelevant. Plaintiff's offer of compromise was an offer for global settlement of the case, regardless of whether he allocated certain sums under certain headings. If Mr. Enquist had accepted either offer, the case would have ended. Plaintiff would have had no recourse to

seek the costs and attorney fees because under RCW 4.84.010 he was not a prevailing party. Division III's decision undermines the central purposes behind the mandatory arbitration system. This Court should accept review to address this important issue.

2. The Decision Fails to Apply Established Rules of Statutory Construction to the 2002 Amendment to RCW 7.06.050.

RCW 7.06.050(1)(b) states that "...**the amount** of the offer of compromise **shall replace the amount** of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo." (Emphasis added.) The plain meaning of the statute is that the amount of the offer simply replaces the amount of the arbitrator's award. One dollar amount should be substituted for another dollar amount without any accommodation for supposed categories of the amount (i.e. some for damages, some for costs).

Where a statute contains both the words "may" and "shall," it is presumed that the Legislature intended to distinguish between them, with "shall" being construed as mandatory and "may" as permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). RCW 7.06.050 contains both "may" and "shall," so the subsection (1)(b) – stating that the amount of the offer "shall" replace the amount of

the arbitrator's award – is construed as mandatory. The number from the offer becomes the arbitrator's award, and there is no room for further mathematics.

Rather than apply the plain language of the statute, Division III added to the statutory language and misconstrued the facts. Division III's decision states:

> We conclude that RCW 7.06.050(1)(b) should be read so that **any segregated amount of an offer** must replace an amount in the same category granted under the arbitrator's award.

215 P.3d at 990, ¶ 15 (emphasis added). The statute says nothing about segregated amounts. RCW 7.06.050(1)(b). A basic tenet of statutory construction is that words should not be added or subtracted from the plain statutory language. *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997) ("An unambiguous statute is not subject to judicial construction, and we will not add language to a clear statute even if we believe the Legislature intended something else but failed to express it adequately.") Division III's interpretation of the statute is inconsistent with the statutory language and the rules of statutory construction. The statute should be applied as written: the compromise offer amount of $17,350.00 replaced the amount of the arbitration award. Thus, when the

jury awarded plaintiff only $16,650.00, Mr. Enquist improved his position at the trial de novo.

The compromise offer provisions of RCW 7.06.050 were added in 2002. Few courts have had an opprotunity to interpret and apply these provisions of the statute. This case provides an ideal opportunity to this Court the matter and clarify how parties and the courts should compare comparables when there has been a compromise offer.

VI. CONCLUSION

Petitioner respectfully requests that this Court grant review.

DATED this 3rd **day of** December **, 2009.**

REED McCLURE

By Marilee C. Erickson

Marilee C. Erickson WSBA #16144
Michael N. Budelsky WSBA #35212
Attorneys for Petitioner

CARLSON, McMAHON & SEALBY, PLLC

By David L. Force WSBA #29997
Attorneys for Petitioner

060349.099157/239360

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFERY W. NICCUM, a married man,	**No. 27504-3-III**
Respondent,	**Division Three**
v.	
RYAN L. ENQUIST, Individually and the marital community composed of he and his wife, if any,	**PUBLISHED OPINION**
Appellant.	

KULIK, J. — The question presented here is whether the trial court erred by subtracting costs and attorney fees from an offer of compromise made after an arbitration award when determining an award of attorney fees under MAR 7.3 following a trial de novo. We conclude the trial court properly subtracted costs and fees before comparing the offer of compromise and the verdict. Thus, we affirm the trial court except as to the award of expert witness fees, which are not included in statutory costs specified in RCW 4.84.010.

APPENDIX A

FACTS

Jeffery Niccum filed suit against Ryan Enquist to recover for injuries sustained in an automobile accident. At mandatory arbitration, the arbitrator awarded the plaintiff, Mr. Niccum, $24,496—this included $6,896 for medical bills, $7,600 for wage loss, and $10,000 for pain and suffering.

The defendant, Mr. Enquist, requested a trial de novo. Mr. Niccum presented Mr. Enquist with the first offer of compromise. The first offer stated:

> COMES NOW Plaintiff, by and through his attorney, JERRY T. DYRESON, and pursuant to RCW 7.06.050 does hereby offer to compromise his claim in the amount of $22,000.00. Such compromise is intended to replace the arbitrator's award of $24,496.00 with an award of $22,000.00.

Clerk's Papers (CP) at 11. Mr. Enquist did not accept this offer.

On July 8, Mr. Niccum presented Mr. Enquist with a second offer of compromise. The second offer stated:

> COMES NOW Plaintiff, by and through his attorney, JERRY T. DYRESON, and pursuant to RCW 7.06.050 does hereby offer to compromise his claim in the amount of $17,350.00. Such compromise is *intended to replace the arbitrator's award of $24,496.00 and replace the previous offer of compromise, with an award of $17,350.00 including costs and statutory attorney fees.*

CP at 12 (emphasis added). Mr. Enquist did not accept this offer.

The case proceeded to a jury trial. The jury returned a verdict of $16,650 in favor of Mr. Niccum. The jury verdict stated:

> We, the jury, find for the Plaintiff in the following sums:
> (1) for past medical expenses $6,650.00
> (2) for past lost wages $0
> (3) for past noneconomic damages $10,000

CP at 6.

Mr. Niccum sought fees under MAR 7.3, arguing that Mr. Enquist had failed to improve his position at trial. Mr. Niccum sought $15,640 in attorney fees and $1,016.28 in costs. Mr. Niccum also sought $1,461 fees for the testimony of his expert witnesses.

The trial court determined that Mr. Enquist had not improved his position at trial. To make this determination, the court subtracted $1,061.28 in costs allowable under chapter 4.84 RCW from the second offer of $17,350 for a total of $16,288.72.[1] This amount was then compared to the $16,650 jury award to determine that Mr. Enquist had not improved his position at trial. Applying MAR 7.3, the court awarded Mr. Niccum $15,640 in reasonable attorney fees and $1,461 in expert witness fees incurred after arbitration. Mr. Enquist appeals.

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[1] There appears to be a mathematical error in the record. However, neither party raises the error nor does it impact the overall award.

ANALYSIS

Fees and Costs Under MAR 7.3. We review the application of a statute or a court rule de novo. *Basin Paving Co. v. Contractors Bonding & Ins. Co.*, 123 Wn. App. 410, 414, 98 P.3d 109 (2004); *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544 (1999). Here, we consider MAR 7.3 and the mandatory arbitration statute, RCW 7.06.050.

Mr. Enquist asserts that the court erred by subtracting $1,016.28 in statutory costs to obtain a figure purportedly comparable to the amount of damages in the second offer of compromise. According to Mr. Enquist's calculations, $17,350, the entire amount of the second offer, replaced the first offer which replaced the arbitrator's award. Thus, Mr. Enquist argues that he improved his position at trial by obtaining a lesser amount of $16,650; therefore, Mr. Niccum was not entitled to attorney fees under MAR 7.3.

In contrast, Mr. Niccum argues that the court is required to "compare comparables" under MAR 7.3, so the court properly reduced the amount of the second offer of compromise by the amount of the statutory fees.

RCW 7.06.050(1) reads in part as follows:

> (a) Up to thirty days prior to the actual date of a trial de novo, a nonappealing party may serve upon the appealing party a written offer of compromise.
>
> (b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, *the amount of the offer of compromise shall replace*

> *the amount of the arbitrator's award* for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

(Emphasis added.)

MAR 7.3 provides in part:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo.

A court's objective in construing a statute is to determine the intent of the legislature. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). To determine legislative intent, we look to the plain meaning of the applicable statute, which is derived from the language of the statute. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

According to Mr. Enquist, RCW 7.06.050(1)(b) should be read so that the entire amount of the second offer replaces the first offer which replaced the arbitrator's award, even though the second offer states that it includes costs and statutory attorney fees. Mr. Niccum points out that a provision in the second offer states that the new offer will

"replace the previous offer of compromise, with an award of $17,350.00 including costs and statutory attorney fees." CP at 12.

We conclude that RCW 7.06.050(1)(b) should be read so that any segregated amount of an offer must replace an amount in the same category granted under the arbitrator's award. We apply the *Tran* analysis for determining attorney fees under MAR 7.3 to the interpretation of RCW 7.06.050(1)(b). *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003).

In *Tran*, the court considered whether Ms. Yu failed to improve her position at trial when the compensatory damages awarded at trial were less than those awarded at arbitration, but the judgment was higher because of the court's award of statutory costs and CR 37 sanctions. Based on case law and a logical interpretation of MAR 7.3, the court concluded that a court should "compare comparables" to determine whether a party failed to improve its position. *Tran*, 118 Wn. App. at 612. As applied in *Tran*, this meant that the court would compare the compensatory damages awarded by the arbitrator with the compensatory damages awarded at trial. *Id.* The court would not include awards for statutory costs and CR 37 sanctions. In fact, the court noted that a party would invariably improve its position if costs such as attorney fees, and interest were taken into account. *Tran*, 118 Wn. App. at 612.

Tran determined that the statutory costs and CR 37 sanctions should not be considered when making a MAR 7.3 determination because these costs were not before the arbitrator and were not "comparable" to the compensatory damages awarded by the arbitrator. *Tran*, 118 Wn. App. at 616. *Tran*'s analysis is applicable here. Thus, we conclude that the trial court correctly considered comparables in the offer of compromise and the jury verdict, and properly subtracted costs and fees.

The jury award to Mr. Niccum of $16,650 was greater than the offer of compromise of $16,288.72. Mr. Enquist would have owed less to Mr. Niccum had he accepted the offer of compromise. He did not improve his position at trial. Mr. Niccum is, therefore, entitled to costs and attorney fees. However, statutory costs as set forth in RCW 4.84.010 do not include expert witness fees. *Colarusso v. Petersen*, 61 Wn. App. 767, 771-72, 812 P.2d 862 (1991).

We affirm the trial court's award of $15,640 for reasonable attorney fees to Mr. Niccum. However, we reverse the award of $1,461 in expert witness fees. Finally, we award attorney fees on appeal to Mr. Niccum upon compliance with RAP 18.1.

Kulik, J.

WE CONCUR:

Schultheis, C.J.

Brown, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JEFFERY W. NICCUM, A married man, Respondent, v. RYAN L. ENQUIST, Individually and the marital community composed of he and his wife, if any, Appellant.	)	**No. 27504-3-III ORDER DENYING MR. ENQUIST'S MOTION FOR RECONSIDERATION AND GRANTING MR. NICCUM'S MOTION FOR RECONSIDERATION AND AMENDING OPINION**

The court has considered both parties' motions for reconsideration and the answers thereto. The court is of the opinion that Mr. Niccum's motion for reconsideration should be granted and Mr. Enquist's motion for reconsideration should be denied.

IT IS ORDERED that Mr. Enquist's motion for reconsideration is denied.

IT IS FURTHER ORDERED that Mr. Niccum's motion for reconsideration is granted and the opinion which was filed on September 1, 2009, shall be amended as follows:

The last sentence on page 1 shall be amended to read: "Thus, we affirm the trial court."

The following language shall be deleted from the final paragraph on page 7:

> However, statutory costs as set forth in RCW 4.84.010 do not include expert witness fees. *Colarusso v. Petersen*, 61 Wn. App. 767, 771-72, 812 P.2d 862 (1991).

The last paragraph of the opinion shall be amended to read:

> We affirm the trial court's award of $15,640 for reasonable attorney fees to Mr. Niccum. Mr. Niccum is entitled to costs and attorney fees, plus expert witness expenses pursuant to RCW 7.06.060(1) and (2).

DATED: November 5, 2009

FOR THE COURT:

JOHN A. SCHULTHEIS
CHIEF JUDGE